



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 9, 2005

Mr. David Weaver  
General Counsel  
Texas State Securities Board  
P.O. Box 13167  
Austin, Texas 78711-3167

OR2005-02023

Dear Mr. Weaver:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 218843.

The Texas State Securities Board (the "board") received a request for the personnel files of three individuals. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted information includes completed employee performance evaluations. Under section 552.022(a)(1) of the Government Code, a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. Sections 552.103 and 552.111 of the Government Code are discretionary exceptions under the Act, and do not constitute "other law" for purposes of section 552.022. *See Dallas Morning News*, 4 S.W.3d at 475-76 (section 552.103 may be waived); Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.111); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Accordingly, the board may not withhold these documents under section 552.103 or 552.111. However, you assert that some of the information in these evaluations is excepted under section 552.108, and section 552.101 is

“other law” for purposes of section 552.022; therefore, we will address your arguments pertaining to the employee performance evaluations under sections 552.101 and 552.108.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. Article 581-28 of the Texas Securities Act provides in relevant part the following:

**Art. 581-28. Investigations, Investigatory Materials, and Registration Related Materials**

A. Investigations by Commissioner. The Commissioner shall conduct investigations as the Commissioner considers necessary to prevent or detect the violation of this Act or a Board rule or order.

...

B. Confidentiality of Certain Registration-Related and Other Materials. To the extent not already provided for by this Act, any intraagency or interagency notes, memoranda, reports, or other communications consisting of advice, analyses, opinions, or recommendations shall be treated as confidential by the Commissioner and shall not be disclosed to the public, except under order of court, for good cause shown. The Commissioner may, at the Commissioner’s discretion, disclose any confidential information in the Commissioner’s possession to any governmental or regulatory authority or association of governmental or regulatory authorities approved by Board rule or to any receiver appointed under Section 25-1 of this Act. The disclosure does not violate any other provision of this Act or Chapter 552, Government Code.

V.T.C.S. art. 581-28(A), (B).

You contend that the submitted employee performance evaluations are confidential under article 581-28(B) as they “fit squarely within this statutory language.” However, we emphasize that article 581-28 is entitled “Investigations, Investigatory Materials, and Registration Related Materials.” We further note that article 581-28(A) is entitled “Investigations by Commissioner,” while article 581-28(B) is entitled “Confidentiality of Certain Registration-Related and Other Materials.” In construing article 581-28(B), we must give effect to the legislature’s intent. See Gov’t Code §§ 311.021, 311.023; *Albertson’s, Inc. v. Sinclair*, 984 S.W.2d 958, 960 (Tex. 1999); *Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436, 438 (Tex. 1997). To do so, we must construe it according to its plain language. See *In re Canales*, 52 S.W.3d 698, 702 (Tex. 2001); *RepublicBank Dallas, N.A. v. Interkal*,

*Inc.*, 691 S.W.2d 605, 607-08 (Tex. 1985). But we must also consider it in the broader context of article 581-28 and the Texas Securities Act as a whole. *See Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001) (“We must always consider the statute as a whole rather than its isolated provisions. We should not give one provision a meaning out of harmony or inconsistent with other provisions, although it might be susceptible to such a construction standing alone.”); *see also* Gov’t Code § 311.011(a) (words and phrases to be read in context). In addition, we note that “[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.” Tex. Gov’t Code Ann. § 311.011(b).

Upon review of the Texas Securities Act as a whole and the headings and purpose of article 581-28 in particular, we are unable to conclude that the employee performance evaluations at issue constitute intraagency or interagency notes, memoranda, reports, or other communications consisting of advice, analyses, opinions, or recommendations for purposes of article 581-28(B). *See* House Committee on Pensions and Investment, Bill Analysis, H.B. 1295, 74th Leg. (1995) (amendments to section 28, Texas Securities Act, article 581-28, concern investigations, investigatory materials, and registration-related materials). Accordingly, the evaluations are not confidential under article 581-28(B), and the board may not withhold them under section 552.101 on that ground. We next address your arguments under section 552.108 for the information subject to section 552.022.

You have marked information in the evaluations that you assert is excepted under section 552.108 of the Government Code, which provides in relevant part as follows:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(1)-(2), (b)(1)-(2). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108, 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You inform us that the release of the information at issue would compromise "current enforcement strategies and ongoing investigations." However, after review of your arguments and the submitted information, we conclude you have failed to establish that release of the information at issue would interfere in some way with the detection, investigation, or prosecution of crime. *See* Gov't Code § 552.108. Accordingly, you may not withhold under section 552.108 any of the information subject to section 552.022.

You assert that the submitted information not subject to section 552.022 is excepted under section 552.103 of the Government Code. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The board has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The board must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us and provide documentation showing that, prior to the board's receipt of the request for information, the three employees at issue, as a consequence of each employee's

employment with the board, were named as defendants in a federal lawsuit filed by the requestor. We therefore agree that litigation was pending when the board received the request. Furthermore, having reviewed the submitted information and your arguments and representations, we find that the information not subject to section 552.022 is related to the pending proceedings for purposes of section 552.103. Therefore, the board may withhold this information pursuant to section 552.103.<sup>1</sup>

We note, however, that once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

To conclude, pursuant to section 552.022 the board must release the employee performance evaluations, which we have marked. The board may withhold the remaining information under section 552.103.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll

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<sup>1</sup>Because we are able to resolve this under section 552.103, we do not address your other arguments for exception of the information not subject to section 552.022.

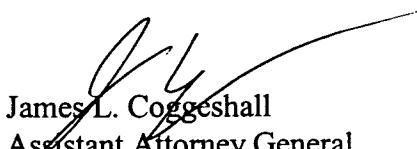
free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/seg

Ref: ID# 218843

Enc. Submitted documents

c: Mr. David H. Disraeli  
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(w/o enclosures)